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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-169

OMAHA TRIBE OF INDIANS, SANTEE SIOUX TRIBE OF INDIANS, WINNEBAGO TRIBE OF INDIANS, MARY RABBIOSI, FELIX W. WHITE, JR., and DIANE LAPOINTE, individually and on behalf of all other similarly situated persons,

Petitioners,

v.

WILLIAM A. PETERS, individually and as NEBRASKA STATE TAX COMMISSIONER and the NEBRASKA DEPARTMENT OF REVENUE,

Respondents.

BRIEF OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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CONSENT TO FILING OF BRIEF AMICUS CURIAE

Petitioners and Respondents have filed with the Clerk of this Court written stipulations consenting to the filing of this brief.

INTEREST OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE

The National Tribal Chairmen's Association (hereinafter referred to as NTCA) is a voluntary, non-profit organization composed of the chairmen, presidents, governors or chiefs of reservation Indians or federally recognized Indian tribes with federal trust lands or whose members live on or near federal reservations having a local governing entity. The heads of all Alaska Native Regional Corporations are also eligible for membership. The members all are leaders duly elected or appointed by their people according to their tribal constitutions or governing instruments. Approximately 188 federally recognized tribes having a population of approximately 540,000 people are represented in NTCA. The chairmen of the Omaha, Winnebago, and Santee Sioux Tribal Councils are members of NTCA. The purpose of the NTCA, as the official voice of elected Indian leaders, is to encourage the preservation of Indian cultures and promote economic, political and social progress among Indian people. Specifically, NTCA declares it its purpose, *inter alia,* to insure that the historic trust relationship between the United States and the reservation Indians, including federally recognized tribes, is not modified or terminated and to employ treaty rights and privileges for the promotion and protection of the human and natural resources of Indian reservations or groups and federally recognized tribes.

The Omaha Tribe, the Santee Sioux Tribe, and the Winnebago Tribe and the individual Indian petitioners, on February 4, 1974, sued the respondent Nebraska State Tax Commissioner to enjoin him from administering the state personal income tax laws on reserva-

tions within the state. Petitioners claim that the State of Nebraska has no authority to tax income earned by individual Indians on reservations within the State and that the immunity against State taxation established in *McClanahan* v. *State Tax Commission of Arizona*, 411 U.S. 164 (1973), applies to Nebraska reservation Indians. The U.S. District Court for the District of Nebraska granted summary judgment in favor of the Respondents, ruling that because the State of Nebraska had civil jurisdiction over Nebraska reservations pursuant to Public Law 83-280, 28 U.S.C. § 1360 (1970), that the immunity secured in *McClanahan* did not apply. On appeal, the Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court.

The holding of the Court of Appeals that Public Law 280 authorized Nebraska to impose a State tax on the income earned by Indians working and residing on reservations in the State is of great concern to NTCA and the tribes represented by its members. The NTCA joins and fully supports petitioners in asserting that the decision of the lower court was erroneous on its legal merits.

In addition, the NTCA believes that the lower court's decision only adds to the mounting confusion already surrounding the issue of State taxing authority in Public Law 280 states and seriously undermines the federal and tribal goal of Indian self-determination. Since the Eighth Circuit's ruling in *Omaha Tribe* v. *Peters,* —— F.2d —— (1975), is the first federal appellate decision to clearly uphold the taxing authority of the States under Public Law 280, it will have a major impact on NTCA member tribes not only in States within the jurisdiction of the Eighth Circuit,

but in all of the thirteen States [1] presently having full or partial jurisdiction over reservations under Public Law 280. NTCA, therefore, urges the Court to grant the Writ of Certiorari sought by the Petitioners and to resolve the issue of State taxing authority under Public Law 280.

REASONS FOR GRANTING THE WRIT

I. Public Law 280 Was Not Intended To Be a Termination Statute. Thus a Construction of the Law Which Terminates the Historically Cherished Tribal Immunity From State Taxation Is Unwarranted and Unreasonably Discriminates Among Indian Tribes.

The Eighth Circuit interprets Public Law 280 as a grant to the state of Nebraska of civil jurisdiction so extensive as to fully terminate the immunity from state taxation which had historically been afforded Indian tribes and secured to them by recent decisions of this Court. *Omaha Tribe* v. *Peters,* —— F.2d —— (May 9, 1975), Slip op. at 7; *McClanahan* v. *State Tax Commission of Arizona,* 411 U.S. 164 (1973). Public Law 280, however, was never intended as the comprehensive act of termination which the lower court's decision suggests.

The Federal policy of terminating the trust relationship existing between the United States and the Indian tribes reached its ascendance in the early 1950's. In 1952, the House of Representatives, by resolution, ordered its Committee on Interior and Insular Affairs to investigate the Bureau of Indian Affairs and determine how that agency had evaluated the qualifications of Indian groups and tribes to manage their own affairs without further Federal supervision. H.R.Res. 698, 82d Cong., 2d Sess. (1952). The House Interior Committee responded, recommending a policy of assimilation of Indians into the Nation's social and economic life. H.Rep.No. 2503, 82d Cong., 2d Sess., 124 (1952). Congress expressed this termination policy most concretely in 1953 in House Concurrent Resolution 108, 67 Stat. B132 (1953), which declared that Indians should be made subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, "*as rapidly as possible.*" But the termination resolution was more specific in its actual resolving provisions as it focused on certain states and tribes:

> [I]t is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians: The Flathead Tribe of Montana, the Klamath Tribe of Oregon, the Menominee Tribe of Wisconsin, the Potowatamie Tribe of Kansas and Nebraska, and those members of the Chippewa Tribe who are on the Turtle Mountain Reservation, North Dakota. H.Con.Res. 108, 83d Cong., 1st Sess; 67 Stat. B132 (1953).

This resolution was passed August 1, 1953, while Public Law 280 was approved August 15, 1953. California is the only Public Law 280 state also scheduled for termination by the Concurrent Resolution of the House, while the Menominee Tribe was at the same time spe-

[1] The following states have full or partial jurisdiction over Indian reservations: Alaska, Arizona, California, Florida, Idaho, Iowa, Minnesota, Montana, Nebraska, Nevada, Oregon, Washington, Wisconsin.

cifically excepted from the statute's transfer of jurisdiction and scheduled for termination. The two enactments thus did not coincide. Public Law 280 may have relied to an extent on a philosophy of promoting assimilation, but the total severance of the Federal protective relationship contemplated by the policy of "termination" was very specific in nature and was reserved for those tribes who were ready for it. Thus, subsequent to 1953, Congress began to enact termination legislation applicable to specific tribes. 25 U.S.C. §§ 564, 677, 691, 721, 741, 791, 821, 841, 891, 971 (1970).

The history of Public Law 280 demonstrates that it derived its primary impetus from the need for law enforcement on the reservations. As early as 1948 a House Committee reporting on a criminal jurisdiction bill noted the lack of enforcement on the reservations of laws covering offenses committed by Indians. H. Rep.No. 1506, 80th Cong., 2d Sess. (1948). The report accompanying the bill which became Public Law 280 cited as one of the bill's two major purposes the remedying of "a hiatus in law enforcement authority" on many reservations. H.Rep.No. 848, 83rd Cong., 1st Sess. (1953). The second purpose described in the report was a more general expression of the desirability of having state courts adjudicate civil controversies arising on reservations and of extending "the substantive civil laws" of the states to those Indians who had reached an undefined "level of acculturation and development." *Id.* The report, however, clearly delineated as distinct areas of concern the enactment of legislation concerning termination of federal responsibility for administering tribal affairs and the enactment of legislation aimed at repeal of certain restrictive, discriminatory statutory provisions which set In-

dians apart from other citizens. *Id.* The question of state civil jurisdiction over Indians was one of several under consideration in the area of anti-discrimination legislation. *Id.*

The individual tribal termination acts were also specific in their disposition of the taxation issue. In language similar to Public Law 280, these acts stated, "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens." 25 U.S.C. §§ 564, 677, 703, 757, 803, 899, 980 (1970). Congress, however, did not believe these words were sufficient to resolve the problem of taxing authority because they added in each instance a proviso that "such property and any income derived therefrom by the individual . . . shall be subject to the same taxes, State and Federal, as in the case of non-Indians . . . ." 25 U.S.C. §§ 564J, 677p, 699, 749, 798, 898, 978 (1970).

Since Public Law 280 was not intended by Congress as a termination act, the interpretation given the law by the lower court here, in effect, arbitrarily creates two classes of recognized tribes under federal aegis: those that are subject to state taxation and those that continue to enjoy the immunity inherent in the sovereign and recognized by this Court in *McClanahan.* Those Indians who do not pay taxes to the states stand in a better financial position than those who do. Such disparities of taxation do not encourage the financial independence of individuals or tribes. The inequities inherent in this scheme of classified federal protection do not bode well for the future of the Indian people and it is, therefore, most urgent that this Court resolve the issues presented by petitioners.

II. Tribal Efforts Toward Self-Determination Are Undermined by the Direct Drain of Wealth from the Reservation in Taxes and by the Uncertainty of Tax Liability for Individual Indians and Tribal Economic Enterprises.

In the 1975 Indian Self-Determination and Education Assistance Act, Congress clearly expressed its commitment to "the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people." Act of January 4, 1975, P.L. 93-638, 88 Stat. 2203, 25 U.S.C.A. § 450a(b). Moreover, this Court recently affirmed its support and respect for the self-determination of reservation Indian tribes when it stated, "[I]t is nontheless still true, as it was in the last century, that '[t]he relation of the Indian tribes living within the borders of the United States . . . [is] an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations . . . as a separate people, with the power of regulating their internal and social relations, . . . thus far not brought under the laws of the Union or of the State within whose limits they reside.' *United States* v. *Kagama,* 118 U.S., at 381-382, 6 S.Ct., at 1112." *McClanahan* v. *State Tax Commission of Arizona,* 411 U.S. at 173.

Public Law 280, however, has cast considerable doubt upon the scope of tribal sovereign power. Since this Court has never defined the effect of Public Law 280 on the taxing authority of the States and has expressly reserved judgment on the issue in *McClanahan* v. *State Tax Commission of Arizona,* 411 U.S. 164, 178 n. 18 (1973), the thirteen States possessing jurisdiction under the statute have been left to interpret the extent of their taxing powers over reservations within their

boundaries. These States have drawn the parameters of their taxing authority over the Indians in different ways with inconsistent results. The Eighth Circuit's ruling here, while technically controlling only upon the courts within its jurisdiction, will serve as an invitation to States outside the Eighth Circuit to expand and redefine the reach of their taxing power over the tribes. The inevitable result is an unpredictable tax liability and financial chaos for the more than 100 tribes involved.

The confusion and chaotic taxing policies of the various States which exist now and which will increase as a result of the lower court's decision here, deeply undermine the federal policy favoring Indian self-determination. Self-determination depends in large measure on the development of strong tribal government and the economic development of reservation resources. Although the specific issue in *Omaha Tribe* v. *Peters* relates to the personal income tax imposed on individuals residing on and earning income on the reservation, the unresolved question of State taxing authority under Public Law 280 reaches many aspects of tribal existence and potential development.

Many tribes in the thirteen states directly affected by this decision are currently attempting to develop their economic resources and raise the standard of living of their people through the establishment of on-reservation tribal enterprises. A drain of tribal revenue to the State and the unpredictable tax liability for the corporate enterprise are major obstacles to comprehensive economic planning and development. Furthermore, Congress has recognized that a primary obstacle to Indian self-sufficiency is the near total lack of economic community on many reservations and the finan-

cial inability to develop resources. H.Rep.No. 907, 93rd Cong., 2d Sess. (1974). The potential for extensive State taxation of tribal enterprises compounds these existing problems and frustrates Indian aspirations for the future.

The financial burden which the States may impose upon individual Indians and on-reservation Indian businesses should not be underestimated. Public Law 280 states are located in the Bureau of Census's North Central, West and Alaska regions. According to the 1970 Census,[2] the annual per capita income of the rural Indian population of the North Central region was between $1,122 and $1,132; 35.8 percent of all Indian people in the region had incomes less than the federal poverty level. Of all rural Indian families in the region, 42.2 percent had incomes below the poverty level. In the West, the per capita income of rural Indians was between $1,023 and $1,063. Nearly 42 percent of all Indians and over 50 percent of all rural Indians earned incomes below the poverty level; and the income of 48.5 percent of all rural Indian families was below the poverty level. The figures for Alaskan Indians are comparable with 35.1 percent of all rural families below the poverty level and a personal per capita income of $1,570 for rural peoples. In general, analysis of most traditional indicators show the Indian people to be at the bottom of this country's economic scale and this is especially true in the western and northern states. *See* H. Rep.No. 907, 93rd Cong., 2d Sess., 2 U.S. Code Cong. and Admin. News 2874 (1974). State taxation will thus weigh heavily on many individ-

[2] All data from: U. S. Bureau of the Census, *Census of Population: 1970, Subject Reports, Final Report PC(2)-1F, American Indians.*

uals who already lead an impoverished existence and should not, therefore, be imposed without a full review of state taxing authority by this Court.

III. CONCLUSION

For the foregoing reasons, the Petition for the Writ of Certiorari to review the judgment of the Eighth Circuit Court of Appeals in *Omaha Tribe* v. *Peters* should be granted.

Respectfully submitted,

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